access of air to a wind-mill could be gained, because of the impossibility of interfering with the user. They rely chiefly on the settled law in regard to lights, the peculiarities of which are in many ways not unlike those of support; but they evidently feel a difficulty in dealing with either case on principle, a difficulty which is frankly expressed by Fry, J., in the House of Lords. In the United States the doctrine of acquired rights to light is generally rejected, following *Parker* v. *Foote*,[1] and the right to support would probably be treated in the same way.

In regard to the general doctrine of prescription, the question of *Angus* v. *Dalton* really comes down to this: is the presumption one of law or fact? The view of the majority in the Court of Appeal — that of a presumption of law, rebuttable only by proof that no grant could have been made — is ingenious and plausible; but it is, as Brett, L. J., points out, hardly more than an indirect and rather artificial way of reaching the conclusion of Lush, J., and of many of the American courts. And this conclusion — an arbitrary rule that twenty years' enjoyment under the proper conditions gives an absolute right, on the analogy of the Statute of Limitations — is that to which it seems that the law must ultimately come. Though a pretty strong instance of judge-made law, it is reasonable and satisfactory, and accomplishes the eminently desirable result that two subjects so similar (the acquisition of rights by prescription and under the Statute of Limitations) are put on the same footing.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

CHATTEL MORTGAGES — DEFINITENESS OF DESCRIPTION. — A chattel mortgage described the property as "all my crop of corn, cotton, and other produce that I may raise for the year 1884, in Faulkner county." *Held*, that this description is sufficiently definite to make the record of the mortgage constructive notice to purchasers of the crop. *Johnson* v. *Grissard*, 11 S. W. Rep. 585 (Ark.).

A description which will enable a stranger, aided by such inquiries as the mortgage itself suggests, to identify the property, is sufficient. But if, after reasonable inquiry, the subject-matter of the mortgage is still indefinite, the record is no notice to purchasers. Jones on Chattel Mortgages, §§ 54–5. Thus a mortgage of all the crops raised by the mortgagor in his county for three years is too indefinite. *Muir* v. *Blake*, 57 Iowa, 662.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW. — The Rhode Island statute authorizes the confinement of the insane in State institutions by the parents or guardians, etc., on presentment to the superintendent of a certificate "from two practising physicians of good standing," that such person is insane. None of the modes provided for procuring discharge can be resorted to as of right in his own behalf by the person confined. *Held*, this statute violates Const. R. I., art. 1, § 10, providing that every person shall be at liberty to speak for himself, and no person shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land. As a legal proceeding in which a person proceeded against, if concluded thereby, has not an opportunity of defending himself, is not "due process of law," the statute also violates Const. U. S., Amend. XIV. *In re Gannon*, 18 Atl. Rep. 159 (R. I.).

[1] 19 Wend. 309.

CONSTITUTIONAL LAW — TAKING PROPERTY WITHOUT COMPENSATION. — Where one lives on farm lands outside of a city, as shown by public or private improvements, though within its corporate limits as defined by the Legislature, and beyond the adjacent districts that will be benefited by its municipal expenditures, an act of the Legislature subjecting his property to taxation for corporate purposes of the city is in violation of Const. U. S., Amend. V., providing that private property shall not "be taken for public use without just compensation." *Territory* v. *Daniels*, 22 Pac. Rep. 159 (Utah).

CONTRACTS — ILLEGALITY — WAGERING CONTRACTS. — A contract between brokers and their principal was that they should make purchases and sales for his account on the Board of Trade, but that in accordance with the usages of the Board, they should procure these to be set off against each other, the principal to receive and deliver no merchandise, but only to pay or receive the differences between purchase and selling prices. An action was brought for commissions, *Held*, that, although the contracts made on the Board of Trade by the plaintiffs were legal, yet the special agreement between the plaintiffs and defendant was a wagering contract, and as such, not only void, but illegal, and that plaintiffs could not recover commissions due or money paid in pursuance thereof. *Harvey et al* v. *Merrill et al.*, 22 N. E. Rep. 49 (Mass.).

The above decision goes but a step further in following the American interpretation of provisions against wagering contracts in general, and "dealing" in "options" and "futures" in particular. Their uniform tendency has been towards a rigid enforcement of both the spirit and letter of the law. Mr. Justice Harlan, in delivering the opinion of the Supreme Court, in *Emery* v. *Jemison*, 131 U. S., 336, expressly affirms the doctrine propounded by that court in *Irwin* v. *Williar*, 110 U. S. 499, to the effect that "all such contracts are held to be illegal and void as against public policy." The broker in such cases is regarded as "*particeps criminis*," being "privy to the unlawful designs of the parties." The authority most often cited in recent American cases is a passage in Benjamin on Sales, § 542 (Bennett's notes, 1888); viz., "the whole transaction constitutes nothing more than a wager, and is null and void under the statute." The statute referred to is 8 and 9 Vict. c. 109, § 18. The "Law Quarterly Review," for July, 1889, calls attention to the line of decisions in the English courts interpreting this same statute. It is interesting to the student of judicial legislation to note how widely they diverge in their practical effects from the decisions in our own courts.

The latest case is *Cohen* v. *Kittel*, 22 Q. B. D. 680; it places the limit to which the English courts consent to go, and refuses to allow a principal to recover from a broker the amount of profits lost through the broker's failure to make certain bets. But *Read* v. *Anderson*, 13 Q. B. D. 779, decides that if the agent has made bets on certain horses for his principal, but in his own name, and by the rules of his association, will be ruined in his professional prospects unless those bets are paid, he has a right to pay the bets at the expense of his principal. *Bridges* v. *Savage*, 15 Q. B. D. 363, makes the agent liable to pay over to his principal winnings made on bets for that principal. It goes on the ground that wagering contracts are not illegal,— they are merely void. The trade of a "betting agent" is not unlawful. Perhaps the leading case, however, is *Thatcher* v. *Hardy*, 4 Q. B. D. 693, where the facts were substantially the same as those above stated in *Harvey* v. *Merrill*. The court allowed the broker to recover his commissions, and Bramwell, J., in concurring on appeal, says *apropos* of the argument concerning public policy: "I am not sure that it is a disadvantage that there should be a market where speculation may go on, for it is owing to a market of that kind that we now have so many railways, and other useful undertakings." The inquiry of the "Law Quarterly Review" seems quite pertinent: "Have not the courts unintentionally nullified the effect of 8 and 9 Vict. c. 109, § 18?"

CONTRACTS — PARTIES — RIGHT OF BENEFICIARY TO SUE. — In an action by an administratrix on a promissory note, the defendant offered to prove as a defence, that before the note matured the plaintiff's intestate had, upon a good consideration, promised defendant's father never to sue the defendant upon the note. *Held*, that such a promise was no defence to the action. As the defendant was merely the beneficiary of the contract, he could not have sued upon it, and he cannot therefore use it as a defence. The fact that the promise

was made to the defendant's father is immaterial. *Marston* v. *Bigelow*, 22 N. E. Rep. 71 (Mass.).

This case emphasizes and extends the rules of *Exchange Bank* v. *Rice*, 107 Mass. 37, limiting the right of a beneficiary to sue on a contract. Formerly it was laid down broadly in Massachusetts that the beneficiary had such a right, relying upon early English cases which have since been overruled. *Felton* v. *Dickinson*, 10 Mass. 287; *Brewer* v. *Dyer*, 7 Cush. 337. In *Mellen* v. *Whipple*, 1 Gray, 317, the right was denied as a general rule; but three exceptions were made in order to reconcile previous cases,—viz., in certain cases where the equitable action for money had and received would lie; in cases where promises have been made to a father or uncle of the plaintiff for his benefit; and in cases like *Brewer* v. *Dyer*, *ubi supra*, where an assignee of a lease had promised his assignor, in writing, to pay the rent to the lessor. The last two of these exceptions were questioned in *Exchange Bank* v. *Rice*; the second is by this case declared not to be law; and the only Massachusetts case upon which it rests, *Felton* v. *Dickinson*, *ubi supra*, is distinguished. The case is in line with that of *Twedle* v. *Atkinson*, 1 B. & S. 393, and by it the Massachusetts law seems to be brought into substantial accord with the English; for the third exception, made by the case of *Brewer* v. *Dyer*, *ubi supra*, cannot be regarded as of much authority, since the criticism of it by Gray, J., in *Exchange Bank* v. *Rice*, 107 Mass. 37, at p. 43.

CONTRACTS — TELEGRAPH. — One who makes a contract by telegraph does not constitute the company his agent, and is not bound by mistakes in transmission. *Pepper* v. *W. U. Tel. Co.*, 11 S. W. Rep. 783 (Tenn.).

This case seems to be right in its results. A telegraph company is not a general agent of the sender, for it is authorized to deliver a certain message only. It may be called a special agent. If it delivers a different message from that authorized, it has exceeded its authority. The receiver knows the scope of the company's business, and he cannot hold the sender liable, on the ground that he has held the company out as possessing any greater authority. Gray on Telegraph, §§ 104, 105. English cases *accord*. *Henkel* v. *Pope*, L. R. 6 Ex. 7.

American cases are *contra*. *W. U. Tel. Co.*, v. *Shotter*, 71 Ga. 760; *N. Y. & W. Pr. Tel. Co.* v. *Dryburg*, 35 Pa. St. 298; and cases in Gray on Telegraph, § 104, n. 3.

CRIMINAL LAW — ESCAPE PENDING APPEAL.— Where one convicted of murder escapes from jail, pending appeal, and fails to comply with an order of the court to surrender himself to abide the result of the judgment of the appellate court, the appeal will be dismissed. *State* v. *Carter*, 11 S. W. Rep. 979 (Mo.).

This is in accordance with the general view in this country, as see cases cited in note to Wharton, Crim. Pl. (ninth ed.), § 774 a.

EQUITY JURISDICTION — HUSBAND AND WIFE — SUIT FOR SUPPORT. — Where a husband sends away his wife, and refuses to permit her to return, in a suit by the wife, without reference to whether it is for a divorce or not, a court of equity has power to compel a husband to perform his legal duty to support his wife and children. *Earle* v. *Earle*, 43 N. W. Rep. 118 (Neb.).

EVIDENCE — PRESUMPTION. — Where a freed negress, more than fifty years old, bought up her own daughter, it is presumed that the daughter was given her freedom. *Powell* v. *Conn*, 11 S. W. Rep. 814 (Ky.).

EVIDENCE — RES GESTÆ. — A statement by the victim, to one whom he called to his assistance, that he was robbed and assaulted about half a minute before, by men whom he described, is part of the *res gestæ*, and admissible in evidence against the alleged murderers. So also are statements made ten minutes later, to a friend for whom deceased sent, immediately after the assault. *State* v. *Murphy*, 17 Atl. Rep. 998 (R. I.).

This is evidently a broader doctrine than that laid down in Bedingfield's case, 14 C. C. C. 341, and in line with the general trend of American decisions. *Com.* v. *Hackett*, 2 Allen, 136. The admissibility of the declarations to the friend seems very questionable, however, though from the facts in the case they might possibly have been brought in under the head of "dying declarations." See *Waldele, Adm'r.* v. *N. Y. C. & H. R. R. Co.*, 95 N. Y. 274; *V. & U. R. Co.* v. *O'Brien*, 119 U. S. 99. For a valuable discussion of this vexed subject see 15 Am. L. Rev. 78.

MORTGAGES — POWER OF SALE — LIMITS OF MORTGAGEE'S DISCRETION. — A mortgagee is not a trustee for the mortgagor of his power of sale, and the court

has nothing to do with his motives in exercising it; but the court will consider whether he exercised reasonable care and prudence to realize a fair price. He cannot offer the property to a purchaser for an amount that will cover merely his own claim, independently of the value of the property. *Colson* v. *Williams*, 61 L. T. Rep. 71 (Eng.).

NEGLIGENCE — LETTER-CARRIER — LOSS OF REGISTERED LETTER. — A letter-carrier, having a registered letter containing $100 for A, delivered it to the clerk at the hotel, where A was a guest, the clerk signing a receipt both upon the letter-carrier's book and upon a card to be returned to the sender. The letter was placed by the clerk in the letter-box of the hotel, from which it was purloined. It being the duty of the letter-carrier to deliver a registered letter only to the person to whom it is sent, or upon his written order, the carrier paid A $100, and then brought an action against the clerk for the amount so paid out, charging him with negligence in not delivering the letter. *Held*, the clerk is liable, as he assumed the bailment voluntarily, and must have known the letter was of more than ordinary importance. *Joslyn et al.* v. *King*, 42 N. W. Rep. 756 (Neb.).

NUISANCE — REASONABLE USE OF LAND. — The owner of land may cultivate it in the usual and reasonable manner, without liability to a lower proprietor whose mill-pond is injured by the soil being drained into it by reason of such cultivation. *Middlesex Co.* v. *McCue*, 21 N. E. Rep. 230 (Mass.).

POWERS — RIGHTS OF DONEE'S CREDITORS. — Devise in trust for H (then insolvent) for life, and at his death, "to whom and in such manner as H shall direct." H appointed to his wife. *Held*, the estate was not subject to the claims of those who were creditors of H before the creation of the power. *Wales, Adm'r, et al.* v. *Bowdish, Ex'r, et al.*, 17 Atl. Rep. 1000 (Vt.).

The case arrives at this conclusion after a full consideration of the authorities, although recognizing that the result is opposed to the mass of the decisions. For the contrary view see Leake's Dig. of the Law of Prop. in Land, pp. 426–7, and cases there cited.

REAL PROPERTY — FIXTURES. — Rails of a tramway used only for temporary purposes are not fixtures. *De Laine* v. *Alderman*, 9 S. E. Rep. 950 (S. C.).

REAL PROPERTY — PARTY WALLS — RIGHTS OF OWNERS. — The party wall between the houses of the plaintiff and defendant was built by the owner of both estates and conveyed as the partition wall between the houses. There was no express grant, or agreement, or statute defining or limiting the rights of the parties. The defendant, in altering his house, made a considerable addition to the height of the wall, and the plaintiff brought his bill in equity to compel the removal of so much of the addition as was upon his side of the division line. *Held*, that the defendant had a right to make additions to the wall, provided that he did so without injury to the original wall, and that the bill must therefore be dismissed. *Everett* v. *Edwards*, 22 N. E. Rep. 52 (Mass.).

This case is valuable for the discussion which it contains as to the rights of a joint owner of a party wall when they are not defined by a special agreement. The opinion calls attention to the inconsistencies entailed by treating such an owner as a tenant in common, according to the English view, *Watson* v. *Gray*, L. R. 14 Ch. D. 192, or as a tenant in severalty of the half upon his own land, with an easement in the other half, according to the New York view, *Partridge* v. *Gilbert*, 15 N. Y. 601. The court, by W. Allen, J., proceeds to give its own solution of the problem, as follows: "The estate which the owners have in it is an estate in a party wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party wall, rather than by classifying it with other estates, and deducing its qualities from the name given to it. In effect each owner acquires the right to build one-half of his wall upon his neighbor's land, and each contributing his portion of the expenses has a right to an equal benefit in the wall so built. The wall is a substitute to each for a separate wall, and there can be no implied limitation of his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor." An "estate in a party wall" is not mentioned in Littleton, but the recognition of its true nature seems to be an eminently sensible way of meeting the difficulties of the question.

TRUSTS — CHARITIES. — Property was devised to a lodge of Odd Fellows "for the benefit of the widows and orphans." The lodge was holding all the prop-

erty that its charter allowed. *Held*, that the charity was sufficiently definite for the State to enforce, and that the failure of the trustee to act would not cause the property to revert to the heirs. Moreover, the capacity of the corporation could not be questioned by the heirs, but only by writ of *quo warranto*. *Heiskell* v. *Chickasaw Lodge*, 11 S. W. Rep. 825 (Tenn.).

In England, when property is devised for indefinite charities, and no trustee is appointed, or those appointed cannot act, the king, as *parens patriæ*, will direct the application of the fund as he thinks best. This prerogative is exercised by the chancellor under the sign-manual of the king. The power also extends to those cases where the charity is illegal or cannot be carried out. In the United States there is no one to exercise this prerogative, unless, as in Pennsylvania, the Legislature confers it by statute. Perry on Trusts (3d ed.), §§ 718, 721; Kent's Commentaries, vol. ii. (12th ed.), p. 508, n. 1; *Jackson* v. *Phillips*, 14 Allen, 539. It is held in many States in this country, that, in place of this prerogative power, the courts of equity, as such, are bound to carry out the testator's intention as nearly as possible, and where the particular charity has failed, will substitute another charity of the same nature. This power does not cover indefinite charities, which revert to the heirs.

WILLS — TESTAMENTARY CAPACITY — BURDEN OF PROOF. — The presumption of the law is in favor of testamentary capacity, and the burden of proof is on those who assert the contrary. *McCoon* v. *Allen*, 17 Atl. Rep. 820 (N. J.).

This seems to be an instance of confounding the "burden of proof" with the "burden of going forward with evidence." According to the accepted doctrine the burden of proving testamentary capacity, *i.e.*, that the will was made by a testator of sound and disposing mind, was on those setting up the will, though after a *prima facie* case had been made out in their favor it might become necessary for the other side to go forward with evidence of testamentary incapacity or be defeated. *Sutton* v. *Saddler*, 3 C. B. N. S. 87; *Barnes* v. *Barnes*, 66 Me. 286.

## REVIEW.

A TREATISE ON THE LAW OF CONVEYANCING. By W. B. Martindale, second edition by Lyne S. Metcalfe, Jr. St. Louis: Central Law Journal Co.

For the student who desires a thorough knowledge of the foundation principles of the subject of conveyancing, this book is too closely confined to modern American practice. Those old statutes of De Donis, Quia Emptores, and especially the Statutes of Uses and Enrolments, receive but the merest mention. Considering how little is said of either future estates or the Statute of Uses, it seems a pity to leave the reader in the least doubt whether a "freehold may be limited *in futuro* by bargain and sale." (63, note 1.)

For the actual conveyancer, the subject is not treated enough in detail. Deeds, leases, mortgages, and wills are all included in the 600 pages of reading-matter. One would think that seals might be treated exhaustively, even if some less relevant matter should be omitted. On examination we find that New York alone is charged with refusing to recognize a printed seal, whereas Massachusetts has done the same. The subject of stamps is not even mentioned, nor is a single form given.

Still the book is of convenient size, and is splendidly indexed. To the readers who desire a general knowledge of settled principles the book is valuable. This class probably calls for the second edition.

The alterations of the text in the second edition are not numerous, but the number of cases cited is somewhat increased. C. H.